

permit situation following a consideration of whether the violation being resolved was knowing or intentional and other indications of the need for a penalty. For example, where an unauthorized fill meets the terms and conditions of NWP 13, the DE can consider the appropriateness of allowing the residual fill to remain, in situations where said fill would normally have been permitted under NWP 13. A knowing, intentional, willful violation should be the subject of an enforcement action leading to a penalty, rather than an after-the-fact authorization. Use of after-the-fact NWP authorization must be consistent with the terms of the Army/EPA Memorandum of Agreement on Enforcement. Copies are available from each district engineer.

PART 331—ADMINISTRATIVE APPEAL PROCESS

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APPENDIX A—ADMINISTRATIVE APPEAL PROCESS.

APPENDIX B—APPLICANT OPTIONS WITH PROFFERED INDIVIDUAL PERMIT.

AUTHORITY: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 64 FR 11714, Mar. 9, 1999, unless otherwise noted.

EFFECTIVE DATE NOTE: At 64 FR 11714, Mar. 9, 1999, Part 331 was added, effective Aug. 6, 1999.

§ 331.1 Purpose and policy.

(a) *General.* The purpose of this Part is to establish policies and procedures to be used for the administrative appeal of permit applications denied with prejudice, and for the administrative appeals of declined individual permits. The appeal process will allow the affected party to pursue an administrative appeal of certain final Corps of En-

gineers decisions with which they disagree. The basis for an appeal, and the specific policies and procedures of the appeal process, are described in the following sections. It shall be the policy of the Corps of Engineers to promote and maintain an administrative appeal process that is independent, objective, fair, prompt, and efficient.

(b) This administrative appeal process provides only for the appeal of permit denials or declined individual permits.

(c) Permit decisions made by a division engineer or higher authority may be appealed to an Army official at least one level higher than the decision-maker. This higher Army official shall make the decision on the merits of the appeal, and may appoint a qualified individual to act as a review officer (as defined in § 331.2 of this Part). References to the division engineer in this Part shall be understood as also referring to higher-level Army authority when that authority is conducting an administrative appeal.

§ 331.2 Definitions.

The terms and definitions contained in 33 CFR Parts 320 through 330 are applicable to this regulation. In addition, the following terms are defined for the purposes of Part 331:

Affected party means a permit applicant who has received a permit denial, or who has declined a proffered individual permit.

Agent(s) means the affected party's business partner, attorney, consultant, engineer, planner, or any individual with legal authority to represent the appellant's interests.

Appealable action means a permit denial, or a declined individual permit, as these terms are defined below.

Appellant means an affected party who has filed an appeal of a permit denial or declined individual permit under the criteria and procedures of these regulations.

Declined permit means a proffered individual permit, including a letter of permission, that an applicant has refused to accept, because he has objections to the terms and conditions therein. A declined permit can also be an individual permit that the applicant originally accepted, but where such

permit was subsequently modified by the district engineer, pursuant to 33 CFR 325.7, in such a manner that the resulting permit contains terms and conditions that lead the applicant to decline the modified permit, provided that the applicant has not started work in waters of the United States authorized by such permit. Where an applicant declines a permit (either initial or modified), the applicant does not have a valid permit to conduct regulated activities in waters of the United States, and must not begin construction of the work requiring a Corps permit unless and until the applicant receives and accepts a valid Corps permit.

Denial determination means a letter from the district engineer detailing the reasons a permit was denied with prejudice. The decision document for the project will be attached to the denial determination in all cases.

Notification of Applicant Options (NAO) means a fact sheet explaining an applicant's options with a proffered individual permit under the administrative appeal process.

Notification of Appeal Process (NAP) means a fact sheet that explains the criteria and procedures of the administrative appeal process. Every permit denial, and every proffered individual permit returned to the applicant for reconsideration after review by the district engineer in accordance with § 331.6(b), will have an NAP form attached.

Permit denial means a written denial with prejudice (see 33 CFR 320.4(j)) of an individual permit application as defined in 33 CFR 325.5(b).

Request for appeal (RFA) means the affected party's official request to initiate the appeal process. The RFA must include the name of the affected party, the Corps file number of the denied or declined individual permit application, the reason(s) for the appeal, and any supporting data and information. A grant of right of entry for the Corps to the project site is a condition of the RFA. A standard RFA form will be provided to the affected party with the NAP form. The affected party initiates the administrative appeal process by completing the RFA and returning it to the appropriate Corps of Engineers division office.

Review officer (RO) means the Corps official responsible for assisting the division engineer or higher authority responsible for rendering the final decision on the merits of an appeal.

§ 331.3 Review officer.

(a) *Authority.* (1) The division engineer has the authority and responsibility for administering a fair, reasonable, prompt, and effective administrative appeal process. The division engineer may act as the review officer (RO), or may delegate, either generically or on a case-by-case basis, any authority or responsibility described in this Part as that of the RO. However, the division engineer may not delegate any authority or responsibility described in this Part as that of the division engineer. Regardless of any delegation of RO authority or responsibility, the division engineer retains overall responsibility for the administrative appeal process.

(2) The RO will assist the division engineer in reaching and documenting the division engineer's decision on the merits of an appeal, if the division engineer has delegated this responsibility as explained above. The division engineer has the authority to make the final decision on the merits of the appeal. Neither the RO nor the division engineer has the authority to make a final decision to issue or deny any particular permit, pursuant to the administrative appeal process established by this Part. The authority to issue or deny permits remains with the district engineer. However, the division engineer may exercise the authority at 33 CFR 325.8(c) to elevate any permit application, and subsequently to make the final permit decision. In such a case, any appeal process of the district engineer's initial decision is terminated. If a particular permit application is elevated to the division engineer pursuant to 33 CFR 325.8(c), and the division engineer's decision on the permit application is a permit denial, or results in a declined permit, that permit denial or declined permit would be subject to an administrative appeal to the Chief of Engineers.

(3) *Qualifications.* The RO will be a Corps employee with extensive knowledge of the Corps regulatory program.